A

YAP CHIANG

v.

KOH SAU CHOON & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[ORIGINATING SUMMONS NO: S6-24-3086-2002]
9 OCTOBER 2007

C ***CIVIL PROCEDURE:*** *Summary possession of land - Application for - Locus standi - Whether plaintiff given right or title by relevant authority - Whether plaintiff has standing under O. 89 Rules of the High Court 1980 - Whether plaintiff could maintain a right to possession - Evidence Act 1950, s. 42*

D

The plaintiff herein was acting on behalf of the Kwong Tong Cemetary Management Kuala Lumpur. The subject matter herein was state reserved land for the purpose of a Cantonese cemetery. The defendants were occupiers of the land and have occupied the land from time immemorial. It was the plaintiff's assertion that it is her right to the possession of the land. The submission of the parties were (i) *locus standi*; (ii) applicability of O. 89 of the Rules of the High Court 1980 and (iii) relevance of a court of appeal decision on matters of public nature.

E

F **Held (dismissing the plaintiff's application):**

(1) There was no evidence that the plaintiff was an association authorised by the relevant authority to have the management of the land reserved for a Chinese cemetery. The registration papers, change of name and rules of the association did not create any right or title which must be given by the relevant authority. (para 12)

G

(2) In the absence of any evidence of such authority, the plaintiff had no standing under O. 89 to maintain this action as it could not then maintain a right to possession. The plaintiff and the defendants were in similar position or standing of persons seeking occupation of reserve land. Without evidence of authority the plaintiff was in no better position than the defendants to occupy the reserved land, and to seek to remove the defendants from the land. (para 21)

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I

(3) A Sessions Court had earlier granted orders in favour of the then trustees of the Kwong Tong Cemetary, which was set aside by the High Court. The Court of Appeal had confirmed the decision of the Sessions Court. However, plaintiff herein had not seen it fit to commence proceeding by writ, but by an originating summons. Unlike in that case, there was no evidence adduced that the trustees have been lawfully appointed to have management of the cemetery. (paras 13, 14 & 15)

(4) The order of the Court of Appeal was to reinstate the decision of the Sessions Court. However, the basis upon which that decision was made was not shown. No grounds of decision of the Court of Appeal had been produced. While the order of the Court of Appeal remained binding, in the absence of the grounds of decision, it could not be maintained against the world at large that it could safely be concluded that the Court of Appeal had decided finally that the plaintiff had authority to the management of the cemetery on the land, particularly since the defendants had disputed that assertion. Section 42 of the Evidence Act 1950 itself provides that the order was not conclusive proof. (para 23)

Case(s) referred to:

Ng Hee Thoong v. Public Bank [1995] 1 CLJ 609 CA ***(refd)***

Setapak Tin Mines Syndicate Ltd v. Khoo Mean Tee [1970] 1 LNS 146 FC ***(refd)***

Shaheen Abu Bakar v. Perbadanan Kemajuan Negeri Selangor [1996] 2 CLJ 965 CA ***(refd)***

Shaheen Abu Bakar v. Perbadanan Kemajuan Negeri Selangor [1999] 1 CLJ 74 FC ***(refd)***

Legislation referred to:

Essential (Clearance of Squatters) Regulations 1969, reg. 4
Evidence Act 1950, s. 42
National Land Code, s. 425
Rules of the High Court 1980, O. 89

For the plaintiff - KH Yeap; M/s Koh & Assoc
For the defendants - KC Cheah; M/s KC Cheah & Co

Reported by Suhainah Wahiduddin

A

JUDGMENT

Abdul Wahab Patail J:

The Plaintiff

B **[1]** The plaintiff is the president and in this action acting on behalf of the Kwong Tong Cemetery Management Kuala Lumpur (formerly known as the Kwong Tong Cemetery Kuala Lumpur).

Agreed Facts

C **[2]** It was agreed between the parties that this case is to be the test case for a series of cases as follows: 24-3083-2002; 24-3084-2002; 24-3085-2002; 24-3089-2002; 24-3091-2002; 24-3096-2002; 24-3098-2002 and 24-3087-2002.

D **[3]** It is not disputed that subject matter otherwise known as Kg. Kerayong, Lot 3164 in Mukim Kuala Lumpur, the Federal Territory of Kuala Lumpur, is state reserved land for the purpose of a Cantonese cemetery under F.M.S. Government Gazette No. 510 dated 16 January 1920. It is also not disputed that the E defendants are currently occupiers on the land. They have occupied the land from time immemorial. There is no record they objected to the land being gazetted as a Chinese cemetery.

The Issues

F **[4]** The submission of the parties are centred on three issues ie, *locus standi*, applicability of O. 89 and the relevance of a Court of Appeal decision on matters of public nature.

Locus Standi

G **[5]** The defendants questioned the *locus standi* of the plaintiff upon the ground that since the land is reserved land, s. 425 of the National Land Code is applicable. It was submitted the right of remedy under s. 425 is with the State Authority.

H **[6]** It was also submitted that since the defendants are squatters, the power to remove the defendants lie with the local authority under reg. 4 of the Essential (Clearance of Squatters) Regulations 1969. [PU(A): 395/1969].

I **[7]** Thirdly, it was submitted the application under O. 89 of the Rules of the High Court 1980 was inapplicable.

Grounds

[8] Section 425 provides:

> 425. Unlawful occupation, etc., of State land, reserved land or mining land.
>
> (1) Any person who, without lawful authority:
>
> (a) occupies, or erects any building on, any State land, reserved land or mining land, or
>
> (b) clears, ploughs, digs, encloses or cultivates any such land or part thereof; or
>
> (c) cuts or removes any timber or produce on or from such land,
>
> shall be guilty of an offence, and liable on conviction to a fine not exceeding ten thousand ringgit, or imprisonment for a term not exceeding one year.
>
> (1A) Any person who abets the commission of an offence under sub-s. (1) shall be guilty of an offence, and liable on conviction to a fine not exceeding ten thousand ringgit, or imprisonment for a term not exceeding one year, or to both.
>
> (2) For the purpose of this section, state land shall include all land held by or on behalf of Federal or State Government a local authority or a statutory authority exercising powers vested in it by Federal or State law.

[9] Section 425 created offences where reserved land is used for an unauthorised purpose. It is of no direct application to this case. In *Setapak Tin Mines Syndicate Ltd v. Khoo Mean Tee* [1970] 2 MLJ 191 FC the Federal Court held:

> ... We are of the opinion that section 425 gives the landowner an additional remedy and that the section does not prevent him from coming straight to the court to have unlawful occupiers ejected and that he does not first have to apply to the Collector to act under that section.

[10] In other words, the plaintiff could have gone to the Collector of Land Revenue for the latter to take action, but it does not bar the plaintiff from taking proceedings of his own.

[11] Regulation 4 of the Essential (Clearance of Squatters) Regulations 1969 provides for the local authority to have the power to enter and demolish any squatter hut. It is of no relevance to this case which has been commenced by the plaintiff who is not the local authority.

[12] The plaintiff asserted that it is her right to the possession of the land. But other that that its name is Kwong Tong Cemetery Management Kuala Lumpur, and formerly known as the Kwong Tong Cemetery Kuala Lumpur, there is no evidence that the plaintiff is an association authorised by the relevant authority to have the management of the land reserved for a Chinese cemetery. The registration papers, change of name and rules of the association does not create any right or title which must be given by the relevant authority. The Sessions Court in Kuala Lumpur in Civil Suit 82-19734-86 had granted orders in favour of the plaintiffs who were trustees of the Kwong Tong Cemetery. There was a trial and evidence was adduced and accepted the plaintiffs' evidence:

> ... Seperti yang telah dipersetujui oleh peguam plaintiff oleh sebab tanah tersebut adalah tanah rizab dan plaintif bukan pemilik berdaftar atau pun orang yang mempunyai apa-apa kepentingan bagi tanah tersebut tetapi jelas dari keterangan SP1 bahawa plaintiff pemegang amanah dan mempunyai pengawalan ke atas tanah tersebut. Pemberitahuan warta, menggariskan kuasa yang diberi kepada plaintif untuk memelihara tanah tersebut bagi pihak kaum Kantonis. Dengan itu saya percaya bahawa plaintif mempunyai *locus standi* memulakan tindakan ini terhadap kedua-dua defendan.

[13] In that case judgment was granted in favour of the then trustees. In her judgment the judge of the Sessions Court referred to a Government Gazette No. 1604 that stated "... to be a reserve for the purpose of Cantonese cemeteries, to be maintained by the Trustees of the Cantonese cemetery, Kuala Lumpur.

[14] The High Court sets aside the decision of the Sessions Court. The Court of Appeal confirmed the decision of the Sessions Judge.

[15] However, plaintiff in this case has not seen it fit to commence proceeding by a writ, but by an originating summons. Unlike in that case, there is no evidence adduced that the Trustees have been lawfully appointed to have management of the cemetery.

[16] With regard to O. 89, the plaintiff relied upon *Shaheen bte Abu Bakar v. Perbadanan Kemajuan Negeri Selangor* [1996] 1 MLJ 825 CA. In that case Gopal Sri Ram JCA held:

> In my judgment, the test of standing that is to be applied in cases under O. 89 is one based on a right to possession. The question that has to be asked is whether, given the peculiar circumstances of the particular case, the plaintiff has a right to possession of the land.

[17] The Federal Court expressed a similar conclusion on O. 89 in *Shaheen bte Abu Bakar v. Perbadanan Kemajuan Negeri Selangor* [1999] 1 CLJ 74 FC.

[18] As proof of its right to possession, the plaintiff relied upon its own assertion and submitted by virtue of the fact the defendants had not filed an affidavit of reply, the plaintiff relied further upon *Ng Hee Thoong v. Public Bank* [1995] 1 CLJ 609 that in evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted. But although the plaintiff relied upon *Ng Hee Thoong v. Public Bank (ibid)*, no explanation or grounds were shown why in light of the defendants' challenge or denial that the plaintiff represented all the Cantonese community or that it had authority to manage the cemetery for the Cantonese community, should lead to the conclusion there was an admission. Paragraph 4(a) of the defendants' affidavit in reply at encl. 5 stated:

> 4. (a) Saya menafi perenggan 1 Afidavit tersebut dan menyatakan Plaintif tidak mewakili kesemua kaum Kantonis di kawasan dan sekitar Kuala Lumpur. Plaintif tidak mengemukakan sebarang bukti bahawa "The Association of Kwong Tong Cemetery Management Kuala Lumpur" diberi kuasa untuk mengurus tanah perkuburan untuk suku kaum Kantonis.

[19] The plaintiff had submitted:

> An important point to note is that the Defendants did not file any affidavit in reply to the Plaintiff's Afidavit Jawapan (Enclosure 6). Therefore, the Defendants are deemed to have admitted to the facts asserted by the Plaintiff in that affidavit.

[20] Since the defendants had made the assertion as at para. 4(a) in encl. 5, it was unnecessary for the defendants to file another affidavit to contradict the plaintiff upon its assertion at encl. 6.

Certainly it is unwarranted in the circumstances to draw the conclusion that the defendants had admitted that the plaintiff had the authority to manage the cemetery.

[21] In light of the fact that its authority is disputed in this case, it behoves the plaintiff to adduce evidence of authority. In the absence of any evidence of such authority, the plaintiff has no standing under O. 89 to maintain this action as it cannot then maintain a right to possession. The plaintiff and the defendants are in similar position or standing of persons seeking occupation of reserve land. Without evidence of authority the plaintiff is in no better position than the defendants to occupy the reserved land, and to seek to remove the defendants from the land.

[22] The plaintiff also submitted as follows:

> As mentioned above, in 1986, the Plaintiff, then known as "Kwong Tong Cemetery Kuala Lumpur", filed an action in the Sessions Court against 2 squatters. The Plaintiff's 1986 Action was taken on its behalf by 6 trustees. The Plaintiff won the case at first instance in the Sessions Court (and, ultimately, at the Court of Appeal level). The Judgment and Summons are annexed as Exhibit "E" of Enclosure 6. The Grounds of Judgment of the Sessions Court Judge is annexed as Exhibit "F" of Enclosure 6.

[23] The order of the Court of Appeal was however to reinstate the decision of the Sessions Court. The basis upon which that decision was made is not shown. No grounds of decision of the Court of Appeal has been produced. While the order of the Court of Appeal remains binding, in the absence of the grounds of decision, it cannot be maintained against the world at large that it can safely be concluded that the Court of Appeal had decided finally that the plaintiff has authority to the management of the cemetery on the land, particularly since the defendants have disputed that assertion. Section 42 of the Evidence Act 1950 itself provides that the order is not conclusive proof.

[24] For the reasons above, the application by the plaintiff under the Originating Summons was dismissed with costs.